BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

YEN PHAM	)	
Claimant	)	
	)	
VS.	)	Docket No. 248,884
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER ON REMAND

By its decision filed September 10, 2004, the Kansas Court of Appeals remanded this claim to the Board with instructions to reconsider the import of certain testimony and its materiality to the pending issues. After allowing the parties an opportunity to brief the matter, the Board placed this claim on its summary docket for disposition without additional argument.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the respondent IBP, Inc., a qualified self-insured.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the original Award along with the Court of Appeals' opinion and the parties' subsequent submission briefs.

ISSUES

The ALJ issued an Award granting claimant a 9.45 percent functional impairment to her left upper extremity as a result of her July 20, 1998 accident. The ALJ denied any further permanency or work disability benefits as he concluded there was "no evidence that claimant's symptoms in her right upper extremity occurred simultaneously with her left upper extremity nor is there evidence that claimant's work activities were responsible for her problems in the upper extremity or other parts of her body."[1]

[1] ALJ Award (June 30, 2003) at 4.

Claimant sought review from the Appeals Board (Board) asserting she was entitled to not only a whole body functional impairment, but a substantial work disability under K.S.A. 44-510e(a), as she had not successfully returned to work for respondent. The Board reviewed the entire record and affirmed the ALJ's Award of a scheduled impairment to the left upper extremity, reasoning that claimant had failed to meet her evidentiary burden of establishing that her work activities caused a permanent impairment to her right upper extremity.

Claimant again sought review, this time with the Court of Appeals, alleging the Board's determination was not supported by the evidence as a whole. The Court of Appeals affirmed the Board's finding that claimant sustained a 9.45 percent functional impairment to her left extremity,[2] but concluded the Board "misstated the evidence" with respect to claimant's work activities. They went on to specifically conclude claimant was engaged in a repetitious job up to July 14, 1999. The Court of Appeals remanded the case for the Board to decide whether claimant's "repetitive task jobs through July 14, 1999 rather than April 1999, could have caused the bilateral injury of which she complained."[3]

Thus, the Board must revisit whether claimant has sustained her burden of proving her work activities caused her right upper extremity complaints. Based upon the Court of Appeals' opinion, special attention must be paid to respondent's own records and testimony of the plant nurse which, according to the Court of Appeals, indicate claimant continuously performed repetitive work activities from August 1998 to July 14, 1999.

Claimant urges the Board to either remand the case to the ALJ for the taking of new evidence, or in the alternative, award claimant a functional impairment of as much as 23 percent to the body as a whole, as well as a 100 percent work disability based upon the task and wage evidence contained within the record.

Respondent maintains the only issue to be considered is whether claimant carried her burden of proof and established the element of causation in regard to her complaint of permanent right upper extremity impairment, and even if such a permanent impairment is established, the claimant is, at best, entitled to two scheduled injuries as her complaints manifested at two separate and distinct times.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court of Appeals' opinion succinctly sets forth the relevant facts and the Board accepts them as the law of the case and will not restate them. They will, however, be supplemented as necessary to explain the Board's findings.

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[2] *Pham v. IBP, Inc.*, No. 91,730, unpublished opinion filed Sept. 10, 2004 at 9.

[3] *Id.* at 11.

In its December 31, 2003 Order, the Board affirmed the ALJ's Award and summarized its findings as follows:

> After a complete review of the rather voluminous record, the Board finds these conclusions reasonable under these facts and circumstances and finds no reason to disturb the ALJ's Award in this respect. As did the ALJ, the Board finds no credible evidence within the record that claimant's symptoms in her right upper extremity occurred simultaneously with those in her left upper extremity. Nor is there any evidence that the light duty work activities she performed after July 20, 1998, and up to April 1999, when she reported pain in her right elbow was the result of her light-duty positions, particularly that of "belt watching," a job that merely required her to stand and watch a conveyor belt. Absent some causative link between her work activities and her physical complaints to her right upper extremity or any of the other physical complaints she has articulated, there is no basis for further recovery. Likewise, there is no basis for awarding a whole body impairment or a work disability.[4]

The Court of Appeals took issue with the Board's finding on the issue of causation and declared that the Board misstated the evidence. In coming to that conclusion, the Court of Appeals observed that due to a language barrier, claimant was "quite clearly"[5] confused while she was testifying about the jobs she performed from July 20, 1998, the date she reported her left elbow complaints, to April 1999, when she reported right elbow complaints. In short, while the Board believed, as claimant testified, that she was assigned to "belt watching" in April 1999,[6] a job that required her to stand and watch a conveyor belt, the Court of Appeals determined this testimony should be disregarded. Once that evidence is excluded, the Court of Appeals found it was persuaded by respondent's records which indicated claimant was assigned to "belt wiping", a job that required her to periodically wipe down a belt and the job of stir-fry, which involved cutting with a knife.

Based upon this view of the evidence, the Court of Appeals went on to make the following factual finding:

> While there is no testimony in the record that claims Pham's [claimant's] pain in her left upper extremity caused the pain in her right upper extremity, it is up to the factfinder to determine if Pham's [claimant's] *repetitive task jobs* through July 14, 1999, rather than April 1999, could have caused the bilateral injury of which she complained.[7]

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[4] Board Order (Dec. 31, 2003) at 6.

[5] *Pham v. IBP, Inc.*, No. 91,730, unpublished opinion filed Sept. 10, 2004 at 12.

[6] R.H. Trans. at 33.

[7] *Pham v. IBP, Inc.*, No. 91,730, unpublished opinion filed Sept. 10, 2004 at 11.

The Court then noted that-

> [W]hen a primary injury under the Kansas Workmen's Compensation Act is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury, including a new and distinct one, is compensable if it is a direct and natural result of a primary injury.[8]

They then determined "[t]he case must be remanded for the Board to consider whether its apparent misunderstanding and misstatement of the facts are material."[9] With this mandate, the Board has carefully reviewed the record as a whole, the parties' briefs as well as the Court of Appeals' opinion. Ever mindful of the appellate court's conclusions and directives, a majority of the Board finds its original Order should be affirmed in all respects.

The Court of Appeals remanded this case after it concluded that claimant "*may have been confused*"[10] when she denied performing "belt wiping" during a relevant time period, a possibly a repetitive job which "could have"[11] caused her right upper extremity complaints. As a result of this perceived confusion, the Court of Appeals felt claimant's testimony should be disregarded, thus leaving respondent's internal work assignment records as uncontroverted. According to the Court of Appeals, "IBP's own records indicate Pham [claimant] was assigned to 'belt wiping' duty during this period."[12] Thus, the Court of Appeals found that because respondent's plant nurse admitted "belt wiping" was arguably a repetitive job and because the records indicated, at least for some period of time before July 14, 1999, claimant was performing the job of "belt wiping", it follows that claimant was, in fact, performing repetitive tasks up to July 14, 1999.

It is a long standing rule that it is not the role of the appellate courts to weigh conflicting evidence, pass on credibility of witnesses or redetermine questions of fact.[13] Yet, that seems to be the very tact taken in this case. The Court of Appeals has, based upon its reading of the record, opined that a language barrier led to claimant's confusion when she denied performing what is arguably a repetitive job. And as a result, claimant's own admissions as to the sorts of jobs she was performing during a period of time she alleges she was sustaining injury should be discounted. In essence, the Court of Appeals

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[8] *Id.* at 11-12; citing *Nance v. Harvey County*, 263 Kan. 542, 549, 952 P.2d 411 (1997).

[9] *Id.* at 12.

[10] *Pham v. IBP, Inc.*, No. 91,730, unpublished opinion filed Sept. 10, 2004 at 10.

[11] *Id.* at 11.

[12] *Id.* at 11.

[13] *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 387, 22 P.3d 124 (2001).

has determined that claimant was, in fact, performing repetitive tasks *with her right (non dominant) hand* up to July 14, 1999.

The Court of Appeals also seized upon the Board's closing paragraph. The Board indicated it believed there was no evidence that the light duty work activities claimant performed from July 1998, the date she first reported her left upper extremity complaints, up to April 1999, the date she reported her right upper extremity complaints,[14] caused her right elbow complaints. While the Board's language may have been inartful, the evidence, when taken as a whole, supports the Board's original Order.

We, the majority, hereby stand by our original Order and maintain claimant failed to satisfy her burden of proof as to a permanent impairment to her right upper extremity. Confused or not, these members are not persuaded claimant has sufficiently established that her right elbow complaints were caused by her constantly altered light duty activities. With all due respect, the Board believes the Court of Appeals has merely substituted its own factual conclusions for that of the Board's, an act which is improper and unjustified. For these reasons, the Board affirms its original Order, acknowledging that while claimant "*may*" have been confused, the greater weight of the medical evidence and the facts nevertheless support a finding that claimant sustained a 9.45 percent permanent partial impairment to the left upper extremity only as a result of her work-related activities.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

WHEREFORE, it is the finding, decision and order of the Board that the Order of the Appeals Board dated December 31, 2003 is hereby affirmed.

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[14] The importance of this date has escaped the Court of Appeal's notice. Claimant reported her right upper extremity complaints in April 1999. That is the reason the Board has focused on that particular date, rather than on the subsequent 3 months during which claimant was continually reassigned to light duty positions in order to accommodate her left and right upper extremity complaints.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

Based upon the Court of Appeal's factual finding that claimant was performing what it declared was a repetitive job, the dissenting members of the Board conclude that, like the claimant in *Depew,*[15] claimant sustained a simultaneous injury to her upper extremities as a result of what the Court of Appeals declared was a repetitive job, although those injuries did not manifest themselves absolutely simultaneously.[16] Accordingly, we believe she should be compensated based upon a general bodily disability under K.S.A. 44-510e(a).

Claimant was examined by a number of physicians relative to this claim, and both the ALJ and the Board have struggled to make sense of the differing diagnoses, as claimant's unresolved physical complaints seem unimproved despite treatment and negative test results. Dr. Mark Melhorn testified claimant suffered a 10.4 percent whole body permanent impairment based upon a diagnosis of bilateral carpal tunnel syndrome and lateral epicondylitis. Dr. Lynn Ketchum, who served as an independent medical examiner, under K.S.A. 44-510e(a), diagnosed bilateral arm and shoulder complaints and

[15] *Depew v. NCR Engineering & Manufacturing*, 263 Kan.15, 947 P.2d 1 (1997).

[16] *Id.* at 27.

assigned a 12 percent whole body permanent impairment. Dr. Lynn Curtis and Dr. Daniel Zimmerman both opined that claimant's work activities caused claimant's ongoing upper extremity complaints. Dr. Curtis assigned a 16 percent whole body impairment based upon claimant's diminished grip strength while Dr. Zimmerman assigned a 23 percent whole body impairment for upper extremity complaints.

In contrast is the testimony of Dr. Jeffery MacMillan who treated claimant from August 2000 until October 25, 2000. Dr. MacMillan testified that he had no explanation for claimant's diffuse complaints of pain in both upper extremities, shoulders, neck and even into her lower extremities. He indicated that he provided claimant with medications that, in his experience, normally provide relief to most if not all of his patients. Yet, the claimant reported no improvement, even after a series of injections. Dr. MacMillan found claimant to be at maximum medical improvement as of October 25, 2000, and assigned a 0 percent permanent impairment. Claimant was also seen by Dr. Miskew and like Dr. MacMillan, he was unable to assign any permanency to her as he was unable to find any definite history of injury that precipitated her problems.

Given the minority's conclusion that claimant has, in fact, sustained a work-related injury resulting in permanent impairment of function to both upper extremities and after considering the range of permanent impairment opinions offered by the testifying physicians, we would adopt the opinion expressed by Dr. Melhorn and would find claimant had sustained a 10.4 percent functional whole body impairment. Dr. Melhorn's opinions were persuasive as to the left upper extremity impairment and the undersigned minority of Board finds it is equally persuaded by his functional impairment as it relates to the claimant's right upper extremity.

Under the minority's view, the claimant sustained an "unscheduled" injury and her permanent partial general disability is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk*[17] and *Copeland*.[18] In *Foulk*, the Court held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury. However, if there is a finding a worker made a good faith effort then the difference in pre- and post-injury wages based on the actual wages can be utilized.

In this instance, respondent maintains that it has made jobs available to claimant within the permanent restrictions imposed by the treating physicians and that, for whatever reason, claimant has chosen not to work. Once placed on permanent restrictions, it is respondent's policy to allow an injured worker to bid on jobs available within their physical limitations. A medical case manager attempted to assist claimant and encouraged her to bid on available jobs. Claimant initially elected not to bid on these jobs as she maintains she was familiar with the jobs and they caused her pain.

Respondent went so far as to provide job placement services through Dan Zumalt, an associate of Ms. Karen Terrill. Mr. Zumalt prepared a formal job placement program and his efforts centered on finding claimant a job in Wichita, where she had relocated. Claimant was offered two jobs in Wichita while working with Mr. Zumalt. Although the wage and other specifics of those jobs are not within the record, it is uncontroverted that claimant did not take either job. Then, on April 18, 2001, respondent offered claimant the job of picking fat (PBX), a position that was approved by Dr. MacMillan, the treating physician, and Dr. Ketchum. This job would have paid a comparable wage. Accordingly, Mr. Zumalt's services were terminated.

When claimant reported for work on April 23, 2001, as requested, she worked for 5-1/2 hours and then left the plant. She never returned to respondent's facility and has made no effort to contact respondent about re-employment. Since that time, claimant has worked at a hotel for a sum total of 3 days for 5 hours per day. According to her, she was unable to work more because of her pain. She has also worked for cash at two places, but it is unclear if those jobs were for any extended length of time.

The dissenting members of the Board have considered the entire record and believe that the greater weight of the evidence indicates claimant failed to establish a good faith attempt to retain her position with respondent or to find other appropriate employment.

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[17] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[18] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Admittedly, claimant is limited due to the language barrier and her subjective complaints of upper extremity pain. However, at least two jobs from other employers were offered to her while working with Mr. Zumalt and she failed to take advantage of those opportunities. Her other efforts at finding employment have been sporadic. Indeed, the last job she applied for was in November 2002, several months before the regular hearing. The PBX position was approved by at least one physician and although she attempted the work, the undersigned members would find that under these facts and circumstances, 5-1/2 hours is an insufficient period of time to conclude that she was unable to perform the work without further injury. Thus, we would impute the comparable wage available with that job and conclude claimant would be ineligible for work disability benefits as that job would have paid at least 90 percent of her preinjury average weekly wage. Thus, claimant's recovery would be limited to her functional impairment of 10.4 percent permanent partial impairment to the whole body.

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director